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this Memorandum Decision shall not be  
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establishing the defense of res judicata,  
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**IN THE  
COURT OF APPEALS OF INDIANA**

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KEITH A. WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0610-CR-920
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE TIPPECANOE SUPERIOR COURT  
The Honorable Donald C. Johnson, Judge  
Cause No. 79D01-0302-FA-15

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**February 7, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**NAJAM, Judge**

## **STATEMENT OF THE CASE**

Keith A. White appeals from the trial court's denial of his pro se Motion to Withdraw his guilty plea. White raises two issues for our review:

1. Whether the trial court abused its discretion in denying his motion to withdraw his guilty plea.
2. Whether the trial court violated his rights under Blakely v. Washington, 542 U.S. 296 (2004).

We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On May 30, 2001, a confidential informant, under the direction of the Tippecanoe County Drug Task Force, made a controlled drug purchase of crack cocaine from an individual identified as "Bishop." On June 2, White was arrested on an unrelated charge. At that time, White had \$750 in cash on his person. Some of that cash was marked money from the May 30 controlled purchase, and the confidential informant identified White from a photo array as "Bishop." On June 22, 2001, the confidential informant engaged in a second controlled purchase involving \$250 of cocaine from White.

Almost two full years later, on February 25, 2003, the State filed charges against White on eight counts, consisting of five Class A felonies, one Class B felony, one Class C felony, and one Class D felony. All counts related to the dealing or possession of cocaine between May and June of 2001. On April 13, 2004, White entered into a plea agreement, pleading guilty to two counts of Dealing in Cocaine, each as a Class B felony. The plea agreement provided for discretionary sentencing by the trial court, with a

twenty-year cap on executed time, and provided that the sentences would run consecutive to each other.

The trial court scheduled the sentencing hearing for June 4, 2004. However, White failed to appear. On June 7, the trial court issued a bench warrant for White's arrest. White was later apprehended<sup>1</sup> and transported to the trial court on December 13, 2005. On August 11, 2006, White filed a pro se motion to withdraw his guilty plea, which the court denied after a hearing. The court then sentenced White to ten years on each of the two Class B felonies, to be served consecutively. This appeal ensued.

### **DISCUSSION AND DECISION**

White first contends that the trial court abused its discretion when it denied his request to withdraw his guilty plea. Indiana Code Section 35-35-1-4(b) states the applicable standard when a defendant pleads guilty pursuant to an agreement with the State and then requests to withdraw the plea:

After entry of a plea of guilty . . . , but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea . . . for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. . . . The ruling of the court on the motion shall be reviewable on appeal only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea . . . whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

The trial court's ruling on a motion to withdraw a guilty plea arrives in our appellate courts with a presumption in favor of the ruling. *Id.* One who appeals an adverse decision on a motion to withdraw must therefore prove the trial court abused its discretion by a preponderance of the evidence. *Smallwood v. State*, 773 N.E.2d 259, 264

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<sup>1</sup> Although this point is mentioned in both briefs, neither the briefs nor the record indicates an exact date of apprehension.

(Ind. 2002). We will not disturb the court's ruling where it is based on conflicting evidence. Id.

The statute requires the trial court to grant such a request:

only if the defendant proves that withdrawal of the plea "is necessary to correct a manifest injustice." The court must deny a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State. Except under these polar circumstances, disposition of the petition is at the discretion of the trial court.

Weatherford v. State, 697 N.E.2d 32, 34 (Ind. 1998) (citing Coomer v. State, 652 N.E.2d 60, 61-62 (Ind. 1995)) (emphases added). In other words, the trial court's decision on a motion to withdraw a plea is reviewed for an abuse of discretion if there is no claim of manifest injustice to the defendant or substantial prejudice to the State. If a party asserts manifest injustice or substantial prejudice, then the trial court's decision is reviewed for error as a matter of law.

White claims that the trial court should have granted his motion to withdraw his guilty plea on the grounds that there was an unreasonable delay on behalf of the State in filing the original charges against him and that that delay prejudiced his ability to prepare a defense. As White makes no claim of a manifest injustice, we review White's appeal on this issue under the abuse of discretion standard. See id. White must prove that the trial court abused its discretion by a preponderance of the evidence. Smallwood, 773 N.E.2d at 264.

White has failed to show by a preponderance of the evidence that the trial court abused its discretion. Although there is no clear explanation as to why the State delayed in filing charges against White, the mere passage of time is not presumed to be

prejudicial. State v. Sagalovsky, 836 N.E.2d 260, 265 (Ind. Ct. App. 2005) (citing Patterson v. State, 495 N.E.2d 714, 718 (Ind. 1986)), trans. denied. To demonstrate otherwise, the burden is on White to make “specific and concrete allegations of prejudice that are supported by the evidence.” Id.

Here, White makes no specific or concrete allegations of prejudice in either his trial motion or his appellate brief. And at the hearing, the court asked him “[h]ow did the delay specifically prejudice you in this case?” White answered:

Because I, because at, there’s nobody, could nobody remember. If I wanted to, if I wanted to get anybody to come testify against me or even, even [sic] held me out in trial, couldn’t nobody remember what happened two years ago. They, they pre [sic], they waited all this, uh, numerous, not only me but other guy, another guy they waited four years to delay.<sup>[2]</sup> They use that as a tactic to gain leverage on me. Therefore, I had, I could never even stand trial because the delay. They waited so long that I couldn’t I didn’t even understand what, when they hit me with the charge, I didn’t even understand what was going on. And when I tried to set an affirmative defense for myself, couldn’t nobody help me because didn’t nobody remember.

Appellant’s App. at 64. In other words, White asserts that the State’s delay resulted in a denial of due process because potential witnesses were no longer able to recall relevant details. But “the mere allegation that the passage of time impaired witnesses’ memories is not sufficient to establish prejudice.” Allen v. State, 813 N.E.2d 349, 367 (Ind. Ct. App. 2004), trans. denied. White does not name potential witnesses, he does not indicate to what those witnesses would have testified, and he does not demonstrate how that lack of testimony prejudiced him. Hence, we cannot say that the trial court abused its discretion in denying White’s motion to withdraw his guilty plea.

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<sup>2</sup> This statement appears to be in reference to the same prosecutor’s four-year delay in filing charges against an unrelated defendant on unrelated drug charges.

In addition, White maintains that the trial court's sentencing order violated his Blakely rights. Again, the court sentenced White to consecutive ten-year sentences on two Class B felony convictions, pursuant to the plea agreement. Under the presumptive sentencing scheme in effect at the time of the commission of the crimes at issue, the presumptive sentence for Class B felonies was ten years. See Ind. Code § 35-50-2-5 (2001). Thus, White's appeal on this issue seeks to apply Blakely either to presumptive sentences or to the order that the sentences run consecutive to each other. But we have held that Blakely is not applicable to either of those arguments. See Wieland v. State, 848 N.E.2d 679, 683 (Ind. Ct. App. 2006), trans. denied, cert. denied, 127 S. Ct. 595 (2006). As such, White's appeal on this issue is without merit.

Affirmed.

MAY, J., and MATHIAS, J., concur.